
UTAH LABOR COMMISSION

WOON J. LEE,

Petitioner,

vs.

**STRUCTURAL STEEL & PLATE
FABRICATION and HARTFORD
FIRE INSURANCE COMPANY,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 06-0061

Structural Steel & Plate Fabrication and its insurance carrier, Hartford Fire Insurance Company, (referred to jointly as “Structural” hereafter) ask the Utah Labor Commission to review Administrative Law Judge La Jeunesse's preliminary determination¹ that Woon J. Lee is permanently and totally disabled under § 34A-2-413 of the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mr. Lee claims permanent total disability compensation for injuries suffered in a work accident at Structural on April 15, 2006. After an evidentiary hearing, Judge La Jeunesse determined that Mr. Lee's circumstances satisfied the requirements of § 413(1) (b) and (c) for a preliminary finding of permanent total disability. Judge La Jeunesse therefore ordered Structural to pay subsistence benefits to Mr. Lee, and to elect whether it would submit a reemployment plan for him.

Structural now asks the Labor Commission to review Judge La Jeunesse's decision. Specifically, Structural argues that Mr. Lee is not entitled to a preliminary finding of permanent total disability because he has not satisfied the requirements of § 413(1) (c) (iv), which require proof that Mr. Lee cannot perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity and residual functional capacity.

FINDINGS OF FACT

The Commission adopts Judge La Jeunesse's findings of fact. Because Structural's motion for review addresses only the issue of Mr. Lee's ability to perform other work reasonably available, the Commission restates only the facts that are material to that issue.

¹ Judge La Jeunesse's finding of permanent total disability is referred to as “preliminary” in light of Structural's right under § 34A-2-413(6) to propose a plan to return Mr. Lee to employment.

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Mr. Lee is a Korean immigrant who is now 63 years old. Mr. Lee obtained a high school education and worked several years as a welder in Korea. After coming to the United States, he worked as a hamburger cook for 18 months and then found employment as a welder. He continued to work as a welder for approximately ten years until he was injured in the work accident at Structural on April 15, 2006.

The accident at Structural left Mr. Lee with a fractured vertebrae and a permanent 10% whole person impairment. He is now physically unable to perform work that requires more than a sedentary level of exertion. He cannot engage in repetitive standing, stooping, bending and twisting and must be able to change his position from sitting or standing every 30 to 60 minutes. In addition to these medical and physical limitations, Mr. Lee has little ability to communicate in English.

Mr. Lee twice attempted to return to work at Structural after his accident but was unable to perform the required physical exertion. Medical experts who have examined Mr. Lee agree that he cannot return to work as a welder. Mr. Lee has not sought employment in other occupations due to the limitations resulting from his back injury. For its part, Structural has submitted evidence of several jobs allegedly suitable for Mr. Lee. However, each of these jobs pay less than what Mr. Lee was earning at Structural and also pay less than the average weekly wage in Utah at the time of Mr. Lee's accident. Furthermore, the jobs identified by Structural are not actually available, require greater English skills than are possessed by Mr. Lee, or were not shown to be within Mr. Lee's medical and functional capacity.

DISCUSSION AND CONCLUSION OF LAW

Structural acknowledges that Mr. Lee is entitled to workers' compensation benefits for his work-related back injury. The only issue in dispute is whether Mr. Lee is entitled to the specific workers' compensation benefit of permanent total disability compensation.

To qualify for permanent total disability compensation, Mr. Lee must satisfy each of the several prerequisites set forth in § 34A-2-413 (1) (b) and (c) of the Utah Workers' Compensation Act. Structural concedes that Mr. Lee has met each of those prerequisites except one—the requirement of subsection 413 (1) (c) (iv) that he “cannot perform other work reasonably available, taking into account [his] (A) age; (B) education; (C) past work experience; (D) medical capacity; and (E) residual functional capacity.” On this point, Structural argues that Judge La Jeunesse erred in relying on the Commission's rule R612-1-10.D.1(c), to conclude that employment opportunities identified by Structural did not pay enough to be considered “reasonably available.” Structural also argues that Mr. Lee failed to meet his burden of proving that he cannot perform other work that is reasonably available to him. Each of these arguments is addressed below.

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Application of rule R612-1-10.D.1(c). The Commission's rule R612-1-10.D.1(c) establishes the following wage test as one part of the analysis of whether other work is reasonably available for an injured worker within the meaning of subsection 413(1) (c) (iv) of the Utah Workers' Compensation Act.

c. The work provides a gross income at least equivalent to:

- 1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
- 2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

Structural argues the Commission exceeded its statutory authority in adopting rule R612-1-10.D.(c). However, the Utah Court of Appeals considered and rejected the same argument in *LPI Services et al. v. Labor Commission et al.*, 173 P. 3d 858 (Utah App. 2007).² The Commission therefore concludes that its rule R612-1-10.D(c) is valid and that Judge La Jeunesse properly relied on the rule in concluding that other work identified by Structural did not pay enough to be considered "reasonably available" for Mr. Lee.

Proof that Mr. Lee cannot perform other work reasonably available. Structural also argues that Mr. Lee failed to discharge his burden of proving that he cannot perform other work because he failed to submit testimony to that effect from a vocation expert. The Commission does not accept Structural's premise that an injured worker must submit such expert opinion in order to establish his or her inability to perform other work reasonably available. Generally, an injured worker's testimony regarding the non-availability of other work will be sufficient to discharge his burden of producing evidence on this point. Of course, the ultimate determination of whether other work is reasonably available will be based on all the evidence presented by all the parties.

Structural also argues that Judge La Jeunesse erred in concluding that some of the employment identified by Structural was not reasonably available because there were no actual job openings in those fields. While the Commission agrees with Structural that the law does not require Structural to find a specific job for Mr. Lee, the fact that no job openings can be identified is an indication that such work is not reasonably available.

Next, Structural contends that jobs which require more than a sedentary physical exertion level should be considered as being suitable for Mr. Lee. However, the preponderance of evidence places Mr. Lee in a sedentary physical classification. Consequently, work exceeding Mr. Lee's sedentary limitations cannot be considered appropriate for Mr. Lee.

² The Court of Appeals' decision is under review by the Utah Supreme Court as Case No. 2008-0063. The Supreme Court heard argument on November 5, 2008, but has not yet issued its decision.

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Finally, Structural contends that Judge La Jeunesse erred in rejecting job possibilities that were identified by Structural, but which Structural did not fully define or explain. Structural argues that Judge La Jeunesse's rejection of these jobs relieved Mr. Lee from his burden of proving that other work was not reasonably available for him. The Commission disagrees. Because Structural asserted that the jobs in question were reasonably available, it was Structural's obligation to provide supporting description and detail. As to Structural's argument that Mr. Lee should be denied benefits because he has not attempted to improve his English proficiency, the Commission notes that Mr. Lee was a productive worker in the United States economy for many years. It was his work accident, rather than his lack of proficiency in English, that removed him from the work force. He is therefore entitled to the benefits provided by Utah's workers' compensation system.

ORDER

The Commission affirms Judge La Jeunesse's decision. The Commission remands this matter to Judge La Jeunesse to complete the adjudication of Mr. Lee's claim. It is so ordered.

Dated this 24th day of February, 2009.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.